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February 16, 1998

BY HAND

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Ex Parte Communication in IB Docket 95-59 and CS Docket 96-83

Dear Ms. Salas:

On February 13, 1998, Lawrence Sidman and Sara Morris of Verner, Liipfert, Bernhard, McPherson & Hand, representing Philips Electronics North America Corporation ("Philips") and Thomson Consumer Electronics Corporation ("Thomson"), met with William H. Johnson, Eloise Gore and Darryll Cooper of the Cable Services Bureau on issues pertaining to the pending *Further Notice of Proposed Rulemaking* in the above-captioned proceedings. The substance of these meetings reflected the arguments advanced by Philips and Thomson in their joint comments and reply comments in this proceeding. The attached materials were distributed at the meeting.

In accordance with Section 1.1206 of the Commission's Rules, an original and one copy of this letter and two written ex parte presentations submitted on behalf of Philips and Thomson are being filed with your office.

Any questions concerning this matter should be directed to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

cc w/o encl: William H. Johnson
Eloise Gore
Darryll Cooper

Section 207 of the Telecommunications Act and the Fifth Amendment

Background

As part of its commitment to foster a policy of competition, diversity and choice in the video programming services marketplace, Congress enacted Section 207 of the Telecommunications Act of 1996. Section 207 was designed specifically to eliminate artificial regulatory barriers and private restraints, such as homeowners' association rules and lease restrictions, that have denied viewers' access to new sources of video programming and that have thwarted the development of a fully competitive market for these services. Section 207 directs the Federal Communications Commission (FCC) to:

> ...promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution services, or direct broadcast satellite [DBS] services.

The full implementation of Section 207 according to its Congressional intent will accomplish several important public policy goals, which include:

- providing relief to millions of Americans who have heretofore been denied access to alternative video programming services such as DBS;
- fostering a robustly competitive video marketplace and aggressive price competition by ensuring the viability and continued growth of new services;
- providing the full abundance of educational, informational and entertainment programming (as well as access to advanced information services) to historically underserved populations such as minorities, low-income groups and seniors. A large portion of these groups rent their homes and, as a result, have been denied access by their landlords or community associations to services that compete with incumbent cable providers.

Conversely, if the Commission implements Section 207 only partially (i.e., in such a way as to apply the provision's protections only to persons who own their own home), many of these benefits would vanish. In fact, such action would:

- deny access to competitive video programming services to more than one-third of all American households (35.2% of all American households rent), thereby drastically competitively handicapping new video programming services;
- lessen downward pressure on prices for video programming services that otherwise would be brought about by increased competition;

- completely ignore the rights of low income and minority renters to enjoy the same price, quality and programming benefits offered by new services as persons who can afford to own their own home. In the U.S., 91% of low-income groups, 66% of African American households, 58% of Hispanic households, 48% of Asian households and 47% of Native American households rent. Excluding these groups from Section 207's protections would, ironically, perpetuate and condone the historic obstacles these groups have faced in accessing a full array of communications services.

Notwithstanding these compelling public policy reasons for applying Section 207's protections to *all* Americans, landlords and developers, through a well-coordinated campaign, have raised Fifth Amendment objections to Section 207's being applied to renters and to persons living in multiple dwelling units. As discussed in detail below, these objections are nothing but a red herring and the legal premises upon which they rest their arguments are fatally flawed.

Overview

Both Congress and the Commission have the legal authority to preempt private contractual restrictions on the use of DBS, over-the-air television and wireless cable antennas by tenants and community association unit owners. Further, the Commission can prescribe rules that apply the protections of Section 207 to these persons without requiring an unconstitutional "taking" under the Fifth Amendment and is compelled to do so under existing statutory construction jurisprudence.

Contrary to the claims of some groups, the Commission's rules implementing Section 207 *would not have to mandate third-party ownership and control of the DBS dish antennas and facilities or conversion of community property to the exclusive use of an individual for placement of a DBS dish.* Rather, the Commission can craft rules that require landlords or community associations to provide access to DBS services at the request of a tenant or unit owner but also give landlords or community associations considerable discretion in determining *the means* by which tenants or unit owners could be provided such access, based on the specific characteristics of the dwelling unit, as long as tenants or unit owners could receive a quality service. If adopted, such rules would fulfill the mandate of Section 207 without infringing on the Fifth Amendment rights of property owners.

For example, in the case of a high rise apartment, all tenants or unit owners who elect to subscribe to a particular DBS service would be able to access that programming through *a single, common rooftop-located DBS dish antenna* provided by the landlord or condominium association. The signals could be distributed to individual units through wire using the same conduit utilized by an incumbent cable operator. In the case of attached low rise units, such as townhouses, the landlord or condominium association might elect to require the tenant or unit owner to place the DBS dish antenna in the yard, on the patio, on the roof of his or her unit, or some other exclusive use area, as long as the placement would not impair the viewer's ability to receive DBS service. A DBS service provider would have access to a rental property or commonly owned property in the case of a community association upon the invitation of the

landlord or association in response to a request by a tenant or unit owner. The commercial provider's presence on the property would be conditional upon that invitation.

Moreover, the Commission's rules could specifically permit a landlord or community association to recover the costs associated with providing access to DBS services from tenants or unit owners and to enter into contractual agreements with commercial service providers that could include compensation for such services.

Thus, whether the landlord or community association chooses to install and own its own DBS dish, to turn to a third-party provider, or some other reasonable alterative to make DBS services available would be wholly at the discretion of the landlord or the association. In the end, the rights of property owners to control their own property *and* the rights of *all* viewers to have access to alternative video services are protected.

Statutory Construction Jurisprudence Requires the FCC to Construe Section 207 in a Manner That Fully Implements its Congressional Mandate and that Protects it from Constitutional Challenge.

The Fifth Amendment arguments being employed by landlords and developers in this proceeding presuppose the Commission's mandating third-party ownership and control of the DBS dish and facilities or conversion of community property to the exclusive use of an individual. Such an assumption is misguided and utterly incorrect, for it disregards several other arrangements through which renters may obtain access to DBS signals without imposing upon the Fifth Amendment rights of property owners. In light of these alternative arrangements, statutory construction jurisprudence compels the Commission to construe Section 207's language and to craft its regulations in a manner that fully implements Congress's intent and that protect's it from constitutional challenge.

In a landmark statutory construction case, the Supreme Court held that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S., at 499-501, 504, 99 S.Ct., at 1318-1319, 1320-1321.* The numerous and eminently reasonable alternative arrangements under which all viewers, both renters and homeowners, could be fully protected under Section 207 *without requiring a taking of personal property* require the FCC to craft its rules to effect such full protection.

This concept is further bolstered by the Court's more recent opinion in *U.S. v. Salerno* that "the fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid..." *U.S. v. Salerno, 481 U.S. 739, 745, 107, S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).*

Indeed, the Court has ruled that, given a choice of construing a statute as constitutional or unconstitutional, "It is an established rule of statutory construction that provisions susceptible of

more than one meaning should be intrepreted so as to be constitutional." *McCuin v. Secretary of Health and Human Services, 817 F.2d 161 (1st Cir. 1987) at 12.*

Finally, the Court has held that "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California, 155 U.S. 648, 657, 15 S.Ct. 207, 211, 39 L.Ed. 297 (1895).*

Takings Jurisprudence Clearly Shows that the Application of Section 207's Prohibition of Restrictions to Rental Property and Community Associations Does not Constitute a Taking in Violation of the Fifth Amendment.

Landlords argue that any attempts by the Commission to preempt or limit restrictions on tenants' access to DBS service is a regulatory taking under the Fifth Amendment. Takings jurisprudence clearly shows that this is not the case. Preempting such restrictions pursuant to Section 207 is not an unconstitutional taking.

Connolly v. Pension Benefit Guaranty Corp.

The ability of Congress to change the contractual relationship between private parties through the exercise of its constitutional powers (*e.g.*, the Commerce Clause, Art. 1, § 7) is firmly established. As a general matter, the Supreme Court has made it very clear that private contracts are not outside the reach of proper federal authority. In Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 223-24 (1986), the Court has stated unequivocally:

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> If a regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 223-24 (1986).

Loretto v. Teleprompter Manhattan CATV Corp.

Some have erroneously asserted that an extension of the Commission's rules implementing Section 207 to rental properties would constitute a regulatory taking in violation of the Fifth Amendment of the Constitution under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). This assertion is based on the false premise that the only way the Commission could effectuate the requirements of Section 207 would be to mandate third-party ownership and control of DBS equipment on rental or commonly owned property. As discussed above, it is

entirely feasible to craft rules implementing Section 207 without requiring such third-party ownership.

In Loretto, the Court held that a New York statute that required an apartment building owner to permit a cable television franchisee to place its wires on the owner's property constituted a per se taking of the owner's property without requiring just compensation. The Court determined that the statute mandated a permanent physical occupation of the owner's property by a third party without just compensation, thereby violating the Fifth Amendment rights of the building owner. Loretto, 458 U.S. at 419.

Loretto, however, is inapposite here, because the Court's decision turned on the fact that the physical occupation of the landlord's property involved a third party, not the required provision of a service at the request of a tenant in the building where the landlord owned the installation. Loretto expressly states that a different question would have been presented to the Court if the state statute in question:

> required landlords to provide cable installation if a tenant so desires . . . since the landlord would own the installation. Ownership would give the landlord rights to placement, manner, use, and possibly the disposition of the installation. The fact of ownership is . . . not simply "incidental" . . ; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, aesthetic, and other effects of the installation. Id. at 440, n. 19.

Opponents of preemption have attempted to obscure the Loretto Court's holding regarding third-party occupation, by assuming that the Commission's rules, if extended to rental properties and commonly-owned property, would require that DBS antennas be owned by a third-party, a tenant or a unit owner. That is simply not the case. As discussed above, proponents of preemption envision that providing tenants and condominium unit owners with access to DBS services need not involve third party ownership of facilities.

Indeed, Loretto supports governmental authority to regulate the landlord-tenant relationship where no third-party occupation has been mandated. The Loretto Court affirmed that governmental entities "have broad power to regulate housing conditions in general and landlord-tenant relationships in particular without paying compensation for all economic injuries that such regulation entails." Id. at 440; see also Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (holding that where laws regulate the owner's use of land by regulating the relationship between landlord and tenant, no taking occurs). The Loretto Court expressly states that its holding in that case does not alter the State's power to require landlords to "comply with building codes and provide utility connections, mailboxes, smoke detectors, [and] fire extinguishers . . . in the common area of a building." Loretto at 440. There is no reason to believe that the Court would treat a requirement that a landlord or condominium association install a DBS dish for common use by tenants or condominium unit owners in the building any differently.

FCC v. Florida Power Corp.

In the case of Commission regulations that specifically modified leasehold agreements, the Supreme Court held in FCC v. Florida Power Corp. that the Commission's regulations pursuant to the Pole Attachments Act, regulating the rates utility pole owners could charge companies for space on their poles, did not effect a taking of the pole owner's property, even though the result of that regulation was to interfere with and invalidate provisions contained in private contracts, including those entered into prior to the enactment of the Pole Attachment Act. FCC v. Florida Power Corp., 480 U.S. 245 (1987).

The Court's decision in Federal Communications Commission v. Florida Power Corp., 480 U.S. 245 (1987), provides the appropriate guidance to the Commission on the issue of landlord-tenant relationships. In Florida Power, the Court held that the Pole Attachments Act, which authorized the Commission to regulate the rates that utility-pole owners charged cable companies for space on the poles did not effect an unconstitutional taking of the pole owners' property. Federal Communications Commission v. Florida Power Corp., 480 U.S. 245 (1987).

The Court held that the case should not be governed by the analysis in Loretto noting that while "the statute . . . in Loretto specifically required landlords to permit permanent occupation of the property by cable companies," the pole owners were not required by the Pole Attachments Act to allow installation of the cable on the poles. Id. at 251. Rather, the public utility landlords had "voluntarily" entered into leases with cable company tenants. Id. at 252. The Court found that the "invitation" made the difference and that "the line which separates these cases from Loretto is the unambiguous distinction between a commercial lessee and an interloper with a government license." Id. at 252-253. The Court reaffirmed its characterization of the holding in Loretto as "very narrow" and reiterated that "statutes regulating economic relations of landlords and tenants are not per se takings." Id. at 252.

The instant case presents a situation like Florida Power in which Congress determined to alter the relationship between a landlord and tenant by prohibiting a landlord or condominium association from denying access to DBS services. The means by which the Commission's rules achieve that directive need not mandate third-party occupation of the landlord's property or commonly owned property.

Lucas v. South Carolina Coastal Council

Some have argued that the extension of the FCC's rules implementing Section 207 constitutes a taking since the Court in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895-96 (1992), has recognized that property may be taken without physical invasion if the government enacts a regulation that prohibits a landowner from realizing "economically beneficial or productive use of his land." Lucas v. South Carolina Coastal Council, 112 S. Ct. at 2886 (1992). However, any comparison to the Lucas case is absurd. In Lucas, the Court reviewed a state statute that prohibited landowners like Lucas from building on their beachfront property at all. The Court analyzed the statute in question under the Fifth Amendment to determine whether

the state statute was a regulation that denied the property owner "*all* economically beneficial uses" of his land and essentially left his property "economically idle." Lucas, 112 S. Ct. at 2895-2901 (emphasis in the original).

In marked contrast to the landowner in the Lucas case who was completely foreclosed from building on his property, a Commission rule requiring that landlords and community associations provide tenants and condominium unit owners access to DBS services upon their request would not in any way prohibit the landowner from economically benefiting or using his land. To the contrary, such a requirement could in fact enhance the property's value by making it more attractive to tenants and unit owners and by providing an additional stream of revenue to the property owner. The Commission's can and should craft rules that specifically permit a landlord or community association to recover the costs of access to DBS services from tenants or unit owners and to enter into contractual agreements with commercial service providers that could include compensation for such services.

Bell Atlantic v. Federal Communications Commission

Landlords and developers argue that the extension of the FCC's rules implementing Section 207 would be analogous to the circumstances in Bell Atlantic v. Federal Communications Commission, 24 F.3d 1441 (D.C. Cir. 1994). They suggest that the Bell Atlantic Court held that the Commission's requirement that local exchange carriers ("LECs") permit competitive access providers to connect their lines to those of the LECs ("physical collocation") was a taking under Loretto. However, the Court in Bell Atlantic in fact held that the Commission could not impose a physical collocation requirement upon LECs because Congress had not expressly authorized such action.[1/]

The instant case is distinguishable from Bell Atlantic for two important reasons. First, the court in Bell Atlantic concluded that physical collocation implicated the Fifth Amendment because it required LECs to provide "exclusive use" of a portion of their facilities to third parties. Bell Atlantic, 24 F.3d at 1441. Unlike Loretto and Bell Atlantic, this case does not involve a third party occupation of an owner's property. The Commission's rules, if extended to rental and commonly owned properties, should permit landowners to maintain full authority over their property and to own the DBS antenna used to provide service to a requesting tenant or unit owner. Thus, commercial providers of DBS service would only be provided access to multiple dwelling units to install or maintain the DBS equipment at the request of a landlord or condominium association to accommodate the request for service from a tenant or unit owner and for the common benefit of all residents. A government-mandated, third-party occupation would not be involved at all under such circumstances.

1/ As the Commission itself acknowledges, this holding is now moot since the passage of Section 251(c)(6) of the Telecommunications Act of 1996, which expressly requires LECs to provide physical collocation. See First Report and Order ("Interconnection Order"), CC Docket No. 96-98, CC Docket No. 95-185 at ¶¶ 613-617 (August 8, 1996), 61 Fed. Reg. 45,476 (1996).

Secondly, the court did not decide Bell Atlantic on Fifth Amendment grounds, but on its conclusion that the Commission did not have the statutory authority to impose physical collocation. Id. at 1147. In this case, Section 207 of the Telecommunications Act of 1996 expressly mandates the Commission to issue regulations that prohibit all restrictions that "impair a viewer's ability to receive video programming services" through DBS antennas. The Commission, therefore, not only has the statutory authority to extend the FCC's rules implementing Section 207 to include rental properties and community associations, but is mandated to do so.

Fact Sheet on Rental Housing in the U.S.

Nearly 40 Percent of the Nation's Households Either Rent Their Homes or Live in Condominiums or Co-ops.

- Of the 94.7 million households in the United States, *38.3% (36.3 million) either rent their homes or live in owner-occupied condominiums or co-ops.*[1]
    - 35.2% (33.4 million) of all households are rentals.[1]
    - 4.6% (4.35 million) of all households are condominiums or co-ops (either owner- or renter-occupied).

Minorities, Single Parents (Especially Single Mothers) and Low-Income Groups Are Disproportionately Affected by Laws Which Discriminate Against Renters.

Minorities
- 57% of all African American households are renters.[1]
- 57.8% of all Hispanic households are renters.[1]
- 47.4% of Native American households are renters.[1]
- 48.8% of Asian households are renters.[1]
- 31.4% of all Caucasian households are renters.[1]

Single Parents
- 64.8% of all single mothers rent their homes; 43.9% of single fathers rent their homes.[1]
- The median household income for non-married female renters is $11,917; for non-married male renters, the median income is $20,206.[1]

Lower- and Low-Income Households
- 50.8% of all renters are in lower-income groups (households with less than the median household income).[2]
- 25% of all renters are in low-income groups (households under the poverty level).[1]
- 91% of low-income households are rentals.[1]
- 13.2% of renters receive Welfare or SSI.[1]
- 17% of renters receive Food Stamps.[1]
- 15% of renters receive some form of housing assistance (i.e., public, subsidized or rent-controlled housing).[1]

Senior Citizens Also Comprise a Large Number of Renter Households

- 21% of all renters in the U.S. are above the age of 55[2]
- 19.3% of all renters receive Social Security.[1]

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[1] *Our Nation's Housing in 1993*, U.S. Department of Commerce, Bureau of the Census
[2] *Housing Vacancy Survey - Second Quarter 1996*, U.S. Census Bureau, July 1996